The Cramdown

Tampa Bay Bankruptcy Bar Newsletter — Summer 2000

The President's Message

By Russ Blain

The Year That Was

It's the time of the year for the passing of the gavel. On June 23 at our annual dinner, we'll honor Judge Michael Williamson and celebrate the bar year past and the new year upon us. Julia Sullivan Waters has planned a great evening for us at the Marriott Waterside. Be there!

Yes, bar association presidents and officers come and go. Committee chairs move on to other endeavors. Projects go into their next phases. Life goes on, and the transition is pretty much seamless.

But, not so fast. Let me indulge in some reflection on the year that was, lest we overlook the happenings and the doers of 1999-2000.

Programs and seminars are at the heart of what we're about. Allyson Hughes and Cathy McEwen and their hard-working committee this past year have reached new heights. From a panel of officials of the now-kinder-and-gentler IRS to May's state-of-bankruptcy-law program by National Conference of Bankruptcy Judges president, Judge Mary Davies Scott, the programs were first rate and not to be missed. Along the way came innovations like door prizes and a holiday sing-a-long. Allyson and Cathy: great job!

And great jobs were done by the chairs of the individual programs. When you see them, give a pat on the back to Bob Quinn, Bob Wahl, Cindy Burnette, Dan Herman, Curran Porto, Larry Foyle, Cheryl Thompson, Laura Ann Gardner, David Tong, Lori Vaughan, Adelaide Few, Lorien Smith Johnson, Al Gomez, Greg Golson, and Julia Sullivan Waters.

Then there was the second annual golf and first annual tennis tournaments. More than 100 players showed up for the dual event at Westchase on May 12, and what a great time we all had. Mike Markham, Kim Johnson, Brett Marks, and Paula Luce did the heavy lifting in organizing the tournaments and the awards ceremony that followed.

Our association has always strived to

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Inside This Issue

***The Cramdown* can be accessed via the internet at** www.flmb.uscourts.gov

The President's Message (Continued from page 1)

promote contact and mutual problem solving with the judiciary. Rod Anderson and John Olson kept our side of judicial liaison active and alert to bench and bar issues in a year in which we honored Chief Judge Emeritus Alexander Paskay and welcomed Judge Williamson to the Tampa bench.

Ed Rice kept the court informed of the bar's issues and us informed as the court moved into the era of videoconferencing. Ed's efforts also led to the opening of the long-awaited 10th floor attorney resource room, culminating several years of planning and work. Zola Forizs contributed the furnishings, and the Business Law Section of The Florida Bar donated funds. Clerk Carl Stewart, chief deputy clerk Chuck Kilcoyne, and procurement administrator Craig Socolow worked the court side of the attorney resource room and helped make possible a state-of-the-art facility to meet the needs of our members and visiting counsel.

Community service took on new meaning for our association as we stepped up efforts to promote pro bono services and help for pro se debtors. Pat Smith has embarked on an ambitious agenda for our community service efforts.

A constant is *The Cramdown* that you're reading. John Lamoureux and his committee have kept the writers slaving over a hot computer, tolerated this one columnist's late submissions, and kept the presses rolling with high-quality articles on timely topics, photographs, and great readability. This year paid advertisements helped to defray costs.

Zola Forizs kept our books balanced and our finances solvent. Steve Berman boosted our membership numbers, kept our rolls current and published the directory we've all come to rely on. And it will come as no surprise to all who know her that Sara Kistler, our board secretary, kept perfect minutes and records.

And the judiciary have knocked themselves out for this association and its members. Judge Paskay, Chief Judge George Proctor, Judge Paul Glenn, and Judge Timothy Corcoran have written articles for *The Cramdown*. Judge Paskay, Judge Corcoran, Judge Williamson, and Judge Thomas Baynes have participated on program panels. All of our judges have donated cherished possessions for door prizes for association programs. At the tennis tournament in May, Ben Lambers was swinging the tennis racket that Judge Paskay had donated and that Cindy Burnette had won at the holiday event and loaned to Ben for the tournament.

From the Clerk's side, anything that was needed was ours for the asking from Carl Stewart, Chuck Kilcoyne, Craig Socolow, Chris Muratore, Paula Luce, and all the staff.

Particularly special thanks go to Judge Corcoran and Judge Glenn, who gave inestimable behind-the-scenes help to this bar. Whether it was help coordinating a judicial program, an article that needed a judicial touch, an on-the-spot speaker, sage advice on a bar issue, or even creating song lyrics – whatever the need – they were there for us for the asking.

To the other people whose names I've inadvertently left out, my apology and the thanks of this association.

Being president of this organization has taken more time and commitment than I ever imagined – just ask my partners who've had to pick up the slack for me. But I wouldn't have traded this year for anything (at least anything I can think of at the moment). My thanks to our members for giving me the privilege and opportunity to work with some wonderful people and to watch as some good things happened. This is a great bar association that, thanks to years of dedicated members and leaders, does good work.

John Emmanuel will do a great job as the coming year's president, and I hope he'll have as much fun as I have had.

Let's set the stage for a great new year for the association when we get together on June 23 to honor Judge Williamson and install new officers and directors.

View From The Bench

By The Honorable C. Timothy Corcoran, III
United States Bankruptcy Judge

THE NEW MATH: 20 = 23 -- OR DOES IT?

"Do I have three extra days to respond because I was served by mail?" asked the new bankruptcy lawyer. The answer is, of course, "It depends." Here are the principles that will help you know whether you get those three extra days or whether you do not.

F.R.B.P. 9006 deals with the subject of computing time in bankruptcy court. Paragraph (f) of that rule gives a responding party three extra days to respond in certain circumstances when the triggering paper is served on the responding party by mail. That rule provides:

> *(f) Additional Time After Service by Mail*. When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

The operative language of this rule is "after service of a notice or other paper." The responding party, therefore, needs to look carefully at the triggering paper to determine whether it satisfies this operative language.

Consider these examples:

Interrogatories.

Opposing counsel serves you by mail with interrogatories. F.R.Civ.P. 33(b)(3) requires that you serve answers "within 30 days after the service of the interrogatories." Rule 9006(f)'s operative language, "after service of a notice or other paper," is satisfied. You get the three extra days.

The rules for other discovery devices, such as requests for production and requests for admission, typically use substantially identical language. You, therefore, get the extra time to respond. *See, e.g.*, F.R.Civ.P. 34(b) and 36(a).

Orders Directing Response.

The trustee objects to your client's claim of exemptions. The court enters an order directing your response "within 20 days" and mails it to you. The operative language of Rule 9006(f) does *not* appear to be satisfied because the order requires your response within 20 days of the *entry* of the order, not 20 days from the date you are *notified* of the entry of the order by being served with a copy of the order. You do not, therefore, get the three extra days.

Again the trustee objects to your client's claim of exemptions. Again the court enters an order directing your response and mails it to you. But this time the order directs your response "no later than 20 days after service of notice of the entry of this order." In this case, the order tracks the language of Rule 9006(f), and you get the three extra days.

The lesson here, of course, is to read carefully the orders directing response to see whether the triggering event is the entry of the order itself or notice of the order through its service upon you by mail.

Service Under Our Negative Notice Procedure.

Your client is a creditor, and you have filed a notice of appearance and request for notice. The trustee reaches a compromise with the debtor of their contested exemption litigation. The trustee mails to all creditors a motion to approve the compromise using the court's negative notice procedure. Pursuant to L.B.R. 2002-4, the trustee prominently places the negative notice legend on the first page of the motion informing you that the court will consider the motion without further notice or hearing unless you file and serve "an objection within 20 days from the date of service of this paper." Your response time runs from the service of the motion, Rule 9006(f)'s operative language is satisfied, and you get the three extra days to file and serve your objection.

Appeals.

The judge's ruling, in your judgment, is wrong. You wish to correct the judge's error on appeal. After the clerk dockets the offending order, the clerk mails it to you. F.R.B.P. 8002(a) requires that "[t]he notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from." You are required to file your notice of appeal within 10 days from the *entry* of the order, not from the date you are *notified* of the entry by being served with a copy by mail. You do not, therefore, get the three extra days.

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Summons and complaint.

You represent a Chapter 7 debtor. A creditor files an adversary proceeding seeking to except a debt from the discharge. The creditor serves the summons and complaint by first class mail upon both you and the debtor as permitted by F.R.B.P. 7004(b)(1) and (9). Do you add three days to your response time? No, for a couple of reasons.

First, Rule 9006(f) specifically excludes process. Remember that the rule covers service of a notice or other paper when "the notice or paper *other than process* is served by mail." [Emphasis added].

Second, the 30-day period for responding to a complaint begins to run from the issuance of the summons by the clerk, not from the service of the summons. *See* F.R.B.P. 7012(a).

The Federal Express and Fax Problems.

Determining whether Rule 9006(f)'s operative language is satisfied can sometimes be more difficult when the sender serves the triggering paper by a form of delivery other than the United States Postal Service. Consider these complications.

Opposing counsel sends you discovery requests by Federal Express for delivery the next morning. Whether you get the extra response time depends upon whether service by Federal Express is service "by mail." As you might expect, the cases are split on this question.[1] When using an expedited form of delivery, such as Federal Express, therefore, a considerate and professional opponent will also serve you by mail. [This is the ethics and professionalism segment of this article.] In this way, you will receive the request expeditiously and get the three extra days to respond. Don't count on the additional response time, however, unless you know you are also served by mail. In addition, the careful practitioner will clarify the matter directly with opposing counsel so both of you have the same understanding. Confirm that understanding by letter.

Now try this variation. Opposing counsel sends you discovery requests by fax. Our local rule, L.B.R. 9036-1, provides that "[s]ervice by facsimile constitutes a method of hand delivery for the purpose of computing the time within which any response is required." As a consequence of this local rule, therefore, you do not get the three extra days when served by fax because the rule deems service by fax *not* to be service by mail. Note, however, that the rule further provides that "[s]ervice by facsimile after 5:00 p.m. (at the point of delivery) shall be deemed to have been made on the next business day." If you receive the fax after 5:00 p.m. your time, therefore, you do not begin counting your response time until the next day.

If you serve papers by fax, keep in mind that L. B.R. 9036-1 specifically requires that you follow up the fax service by sending a copy of the paper in one of the manners required by F.R.B.P. 7005. Typically, therefore, you would also need to mail a copy to the recipient, but this mailing will not give the recipient three extra days to respond.

Conclusion.

Knowing for sure when you get three extra days – and when you don't – is important. It will make your professional life easier, especially now that the bankruptcy court is using the Bankruptcy Noticing Center for service of routine orders, such as those directing response, and the mail is taking longer to get to you. Knowing when you get the three extra days is pretty simple if you keep these principles in mind, but tricky if you don't -- all of which just proves, once again, that the practice of law is an art rather than a science.

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[1] *See, e.g., U. S. v. 63-29 Trimble Road*, 812 F. Supp. 332, 334 (E.D. N.Y. 1992), and *Edmond v. U. S. Postal Service*, 727 F.Supp. 7, 11 (D. D.C. 1989), *rev'd on other grounds*, 949 F.2d 415 (D.C. Cir. 1991) [service by overnight delivery is adequate service by mail]. *See also Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1431 (9th Cir. 1996) [no it's not].

SOME RESPONSE TIMES ENLARGED

You may have noticed recently that many of the orders directing response that the court enters in Tampa have enlarged response periods. In many cases, the orders now require a response in 20 days instead of in ten days.

Some of the judges have increased the response periods because of reports from members of the Bar that these kinds of orders, typically sent from the Bankruptcy Noticing Center, are often delayed in the mail and are received just before the response period is up. It is hoped that enlarging the response period can alleviate this problem. Also, check to see if you get three extra days to respond because you are notified of the entry of the order by mail. [See Judge Corcoran's article on this subject in this issue.]

Orders directing response to motions for relief from stay in Chapter 7 cases, however, typically continue to contain the ten-day response period. This is because of the 30-day time limit contained in Section 362 (e). In view of that provision of substantive law, it is thought that the court does not have the latitude to enlarge this response period.

The judges are using several different forms of order directing response tailored for different situations. Not all the judges are using the same forms of order in the same circumstances. As a consequence, read each order you receive carefully to determine precisely when your response is required.

Behind on Reading Your Advance Sheets?

Quick Fix Available

The seminar materials from Judge Mary Davies Scott's Case Law Update are available for $50.00. This price includes a Tampa Bay Bankruptcy Bar Association edition of Matthew Bender's 2000 Collier Portable Code and Rules, a Special 11th Circuit Edition Collier Bankruptcy Case Update, and a 142-page Collier Bankruptcy Case Update by Lexis Publishing containing case digests by Bankruptcy Code section for significant cases decided within the last six months.

You may send a courier, along with a check in the amount of $50.00 made payable to the Tampa Bay Bankruptcy Bar Association, to pick up the package of materials, while supplies last, from:

Al Gomez
Morse, Berman & Gomez, P.A.
400 N. Tampa St., Suite 1160
Tampa, FL 33602

Additional copies of the 1999 - 2000 Membership Directory can be purchased for a nominal fee.

Cost: $5.00, plus $1.00 for postage.

Contact: Sandy Owens
Morse, Berman & Gomez, P.A.
400 N. Tampa St., Suite 1160
Tampa, FL 33602

Please make all requests for additional copies of the directory in writing to Ms. Owens.

Up Close and Personal: An Interview with The Honorable Michael G. Williamson

The Association's Chairman, Dennis LeVine, recently had the opportunity to interview the Middle District of Florida's newest bankruptcy judge, Michael G. Williamson, about how he intends to run his courtroom and what practitioners can expect. The following article contains excerpts from the interview:

1. Judge Williamson, welcome to the Bankruptcy Court in Tampa. You came to the bench as a friend and long-time colleague of many members of our Association. Does that make it easier or more complicated? Also, how do you want to be addressed by attorneys who know you when they see you outside of Court?

I have spent my whole career practicing in the courts of this state. On many occasions I have appeared with or against many of the attorneys who now will be appearing before me. During these years, I also have worked with these attorneys in various bar association activities. Obviously, prior to going on the bench I was on a first-name basis with many of these attorneys.

Unfortunately, being on a first-name basis with a judge in public situations where other attorneys can observe may give the wrong impression. As a result, it's probably best if people who knew me before on a first name basis now refer to me as "Judge" if other attorneys who might appear before me are also present.

2. For those of our members who do not know you, can you tell us a little about yourself -- where you went to school, and where you practiced law?

I come from a military family. We lived in a variety of places until 1963 when my dad retired from the Army in Melbourne Beach, Florida. After graduating from Melbourne High School in 1969, I attended West Point for two years, graduated from Duke, and attended law school at Georgetown.

In 1976 I started my practice with a small firm in Orlando. Two years later I moved over to Maguire, Voorhis & Wells where I spent most of my career. It was a great firm which I had the privilege of managing during the last two years before its merger with Holland & Knight in July of 1998. At Holland & Knight I tried to resume the debtor and committee practice I had prior to going into management and found that the firm's broad based lender representation resulted in my being conflicted out of many cases. Accordingly, in February of last year, I left the firm to go with Kay, Gronek & Latham where I was able to get back to representing corporate debtors and committees in Chapter 11 cases. Soon after joining Kay, Gronek, the position for a bankruptcy judge came open. The rest is history.

3. Can you tell us about what led you to consider becoming a Bankruptcy Judge, and what was it about being a Judge that inspired you to seek that position?

I've always wanted to be a bankruptcy judge. I first applied in 1988, but withdrew my name literally two hours after watching the CNN broadcast of the Congressional vote not to implement a 30% pay increase for bankruptcy judges. With two very young children and having just started building a new home, the timing just wasn't right. But it was always my life's ambition to finish my career as a bankruptcy judge. It gives me a chance to affect the process rather than just being part of the process. I also like the independence from clients and law firm financial constraints.

4. You have been on the bench for a few months now. What are your initial impressions?

I was told it would be an isolated existence, and I'm already starting to appreciate that. It's very different from the practice. This analogy comes to mind. The practice is like being around a noisy pool full of schools kids playing water polo or "chicken fighting." Now I feel like I'm swimming below the surface where the quiet is very nice. I don't even need to come up for air.

5. Your background is as a business bankruptcy lawyer. Since most bankruptcy cases involve consumers, does this present a special challenge?

At times it does. Prior to deciding on how to rule, I am finding that I have to spend a lot of time reviewing the papers filed by the parties and studying the applicable Bankruptcy Code and Rule provisions and relevant case law. On the other hand, I lived through the enactment of the Code and numerous case law and legislative changes, and am fairly familiar with most of the substantive provisions and concepts. The most difficult part when I started concerned the "local protocol or norm" on ruling on various routine controversies. This was complicated by the presence of four other judges in the Tampa Division. I am now beginning to develop my own approach to the various matters that come up on a day-to-day basis.

6. Some people say there are turning points or crossroads in their lives. I don't mean to put you on the spot, but were there one or two such life-shaping events that stand out more than any others in your own life?

I'll answer your question in the context of my professional life. The most life-shaping event was coming to Orlando and starting a bankruptcy practice in the late seventies. At the time, big firms didn't do bankruptcy. I was the first attorney in Orlando to start a full service "main case" bankruptcy practice with a big firm. The folks at Maguire were very supportive of my efforts in terms of hiring associates and

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paralegals to help out as my practice developed. It was essentially open field running for a number of years. There weren't enough hours in the day to handle all of the work that was available throughout the eighties into the early nineties.

The other main career event was becoming president of Maguire. It was a wonderful experience for a business bankruptcy lawyer to be involved in firm management. Interestingly, you see a fair number of bankruptcy lawyers involved in law firm management.

7. Some Florida Bankruptcy Judges outside of the Middle District have allowed attorneys to appear by telephone on certain matters. Do you have any thoughts on allowing telephone hearings, or perhaps video-conference appearances by counsel?

In my days at Maguire, I always volunteered my team as the "guinea pig" for new technology. It's one of my hobbies. As luck would have it, the courtroom that has been assigned to me is the "high tech" courtroom with world class video conferencing and teleconferencing equipment. I welcome the opportunity to use it where appropriate.

8. Some Judges complain that the judiciary, and in particular the federal judiciary, by its very nature makes for a sometimes isolated or cloistered life. Some Judges feel less able to socialize with old lawyer friends. Do you have any concerns?

I think it is inevitable that you become isolated as a judge. Face it, lawyers spend their days dealing with other lawyers. They talk on the phone. They go to depositions together. They have lunch. They go to court. Talk out in the hall. Work on committees together. With the exception of Bar committee work, judges don't do any of those things. There is also the need to maintain actual and perceived impartiality. This leads inevitably to isolation from attorneys. On the other hand, while I've always had many close attorney friends, my wife, Linda and I have been fortunate to have many non-attorney friends. I hope with time we can build a network of friends here in our new community.

9. Many people have asked, how do you think Judge Williamson will be on fees? Well, Judge, what about it?

Having been involved for several years in law firm management, I am acutely aware of law office economics and cash flow problems that can result from delays in payment. Having been a Chapter 11 lawyer, however, I am also aware of abuses that go on, particularly in the large cases. I also feel that there is probably no harder job for a judge than dealing with fee issues. I plan to do my best and deal with fees on a case by case basis.

10. In the article by Russ Blain in the recent issue of *The Cramdown*, you indicated that your courtroom will be more formal than people might expect. Can you tell me a little more about that?

As a practitioner I was fairly easy going. Some may feel that will carry over to the bench. While that may well be the case, keep in mind that I chaired the Local Rules Committee for 14 years. I wrote many of our current Local Rules. As a practitioner, I also followed them, and was always very careful to observe principles of courtroom decorum. I will expect the same from the attorneys appearing before me.

11. Some people say that Judges get the level of practice in their Court that they allow to go on in their Court. What is your attitude toward lawyers who come to your Courtroom and are not prepared or who do not know the law, and how will you handle those situations?

I asked the same question at "Judge's School." How I will react in practice remains to be seen, but the responses I received were to the effect that I'm not there to try anyone's case or to be an advocate for a poorly represented party. This may be easier said than done, however. It's awfully hard to sit back and allow the wrong legal result to occur simply because an attorney doesn't know the law or the correct legal arguments to make.

12. As you know, Judge Paskay is famous for the numerous written and published opinions. Judge Corcoran in Tampa often rules from the bench, and does not issue a lot of published opinions. Do you see yourself writing a lot of opinions, or ruling more from the bench?

Hopefully, with time and experience, both. It's easier said than done but I'm going to try my best to rule from the bench where I can. Another thing they taught us at Judge's School was that ruling only gets harder the longer you wait. As far as writing opinions, I look forward to that opportunity. That's one of the reasons I wanted to be a judge.

13. Judge, I know how important your family is to you. Would you like to tell us about your family?

Three of my favorite things in the world to do socially are (1) play tennis with my wife, Linda, and our tennis friends in mixed doubles on a Saturday night. It is extremely social tennis and everyone has a great time; (2) going out on a Sunday afternoon on my Harley with my 15-year-old daughter, Michelle, and stopping at a diner in a small Central Florida town for lunch; and (3) playing chess with my 13-year-old son Scott, who would proudly tell you he has beaten me six times.

Elizabeth G. Rice was elected President Elect of the Florida Young Lawyers Division of the Florida Bar. Elizabeth will serve as the President of the Young Lawyers Division of the Florida Bar for the year 2001-2002. Ms. Rice graduated from the University of Florida School of Law in 1989 and is a shareholder with the law firm of Stearns, Weaver, Miller, et al in Tampa, Florida.

Kathleen S. McLeroy, of Carlton Fields, has been appointed to the Executive Committee of the American Bar Association Business Law Section's Pro Bono Committee.

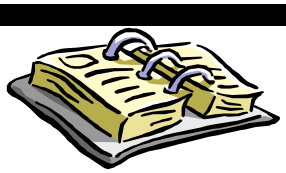
Mark J. Wolfson has been appointed head of the litigation department for the Tampa law firm of Foley & Lardner. He is vice chair of the firm's national business reorganization and creditors' litigation group. Mr. Wolfson received his law degree from the University of Florida College of Law.

William K. Zewadski has been named co-chair of The American Bar Association's national Bankruptcy Subcommittee. He is a lawyer with the Tampa law firm of Trenam Kemker. Mr. Zewadski received his law degree from the University of Florida.

Marsha Rydberg, **Tom Rydberg** and **Richard Petitt** announce the formation of their new law firm, Rydberg & Petitt, P.A. The firm's practice encompasses federal, state, and administrative litigation, in all types of commercial and real estate law, including contract, technology, securities, title, home owners, and construction disputes, bankruptcy, and land use.

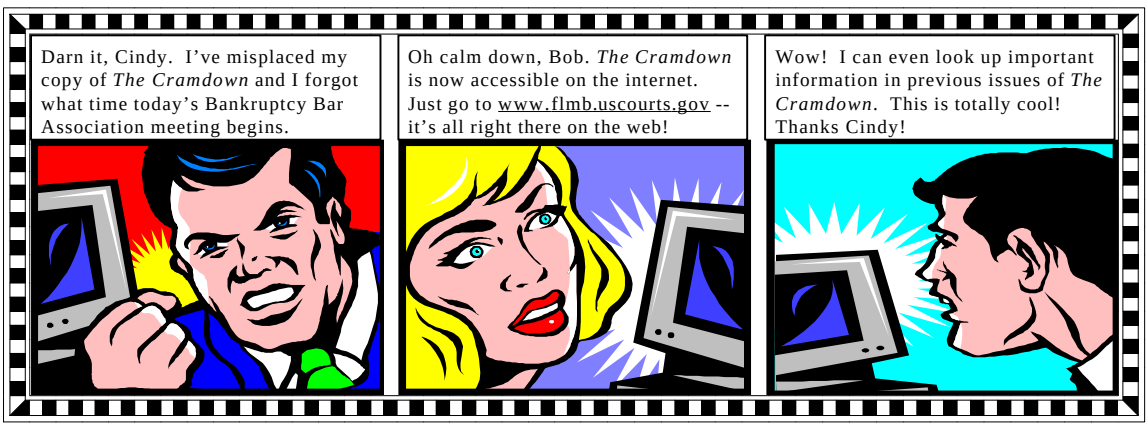
Luis Martinez-Monfort, formerly of Stichter, Riedel, Blain & Prosser P.A., has become an associate with the law firm of Hill, Ward & Henderson P.A. Luis will be joining Doug McClurg, Mike Brundage, Greg Brown and Connolly McArthur as part of Hill Ward's Creditors' Rights and Bankruptcy Department. Luis will concentrate mainly in creditor and debtor representation within bankruptcy.

Contact Donald R. Kirk at (813) 228-7411, 229-8313 (fax), or dkirk@fowlerwhite.com with contributions to this column; include moves, awards, or other happenings concerning TBBBA members.



Calendar of Events

Date	Event	Time	Location
June 16, 2000	Investiture of The Honorable Michael G. Williamson	3:30 p.m.	Marriott, Downtown Orlando
June 23, 2000	Tampa Bay Bankruptcy Bar Association's Annual Dinner—Honoring The Honorable Michael G. Williamson	6:00 p.m.	Marriott Waterside, Downtown Tampa



The Second Annual Tampa Bay Bankruptcy Golf and tennis Tournament Is A "Swinging" Success

Jordi Gusso, from Berger, Davis & Singer-man, and the "Miami Hit Squad" take First Place!

Tournament Chairperson, Michael Mark-ham, describing how far he drove the ball on the first hole.

The team of Noel Boeke, Brett Marks, Dennis LeVine and Rod Ander-son

The U.S. Trustee's Office team of Cindy Burnette, Pat Tinker, Bill Orr[?] and Sara Kistler

Supreme Court Limits Right of Surcharge To Trustee

By Edmund S. Whitson

Resolving the split among the circuits, on May 30, 2000, the Supreme Court recently held that only a bankruptcy trustee (or debtor in possession) has standing to surcharge the collateral of a secured creditor pursuant to 11 U.S. C. § 506(c). In so doing, the Supreme Court once again reaffirmed its adherence to the "plain meaning rule" in limiting its interpretation of the Bankruptcy Code. Of perhaps more significance, however, was the Court's opinion as it relates to broader principles of statutory construction, the obligations of a Chapter 7 trustee to administrative claimants, the precedential value of pre-Code authority, and the role of public policy in the Courts and Congress.

In *Hartford Underwriters Insurance Company v. Union Planters Bank, N.A., 2000 WL 684180* (2000), Hartford provided workers' compensation insurance to the debtor, Hen House Interstate, Inc., during its Chapter 11 case. Hartford, however, was unaware of the debtor's bankruptcy until the case converted to Chapter 7. Arguing that the provision of workers' compensation insurance during the Chapter 11 case provided a substantial benefit to Union Planters (which held a blanket lien on all of the debtor's assets), Hartford sought and obtained a Section 506(c) surcharge against the bank's collateral. The district court affirmed but the Eighth Circuit, sitting *en banc*, reversed.

Writing for a unanimous court, Justice Scalia began his opinion with the statement: "Congress says in a statute what it means and means in a statute what it says there." The Court reiterated its axiom that "when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." Thus, the issue presented by *Hartford* was, as a matter of statutory construction, whether the reference in Section 506 (c) to "trustee" should be construed as exclusive.

In analyzing the context of Section 506 to determine whether Congress in fact intended exclusivity, the Court first held that, when a statute authorizes a specific action and empowers a particular party to take such action, it is legally inappropriate to presume non-exclusivity. The Court also noted that, had Congress intended Section 506 to be broadly available, it could simply have used phrases such as "party in interest" or "an entity," rather than "trustee." The Court also rejected Hartford's argument that Section 1109 authorizes a creditor to surcharge under Section 506(c) because it refused to read Section 1109 so broadly as to provide access to otherwise unavailable substantive remedies.

Responding to Hartford's argument that pre-Code practice authorized administrative claimants to surcharge, the Court recognized the equitable principles espoused in those cases, but held that it was "questionable" whether those precedents established a bankruptcy practice "sufficiently widespread and well recognized" to justify the conclusion that Congress was aware of, and thus implicitly adopted, those cases when enacting the Bankruptcy Code.

Rejecting Hartford's final argument, that as a matter of policy and equity the Court should permit surcharge in order to prevent un-

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just enrichment, the Court, while noting the validity of this argument, intimated that in such cases the trustee might have a fiduciary duty to seek surcharge. Moreover, the Court also dismissed Hartford's appeal to public policy as more properly within the province of Congress rather than the Courts. Perhaps bearing on the Court's consideration of this argument were certain aspects of fault and negligence, as it commented that Hartford should have been more diligent in not funding the workers' compensation policy after default. Of possibly additional significance was the Court's allusion to the "derivative right doctrine," whereby it suggested that an administrative claimant, whose demand on the trustee was unreasonably refused, might receive court authority to surcharge. Ultimately, the Court was influenced, and perhaps dispositively persuaded, by its fear that allowing administrative claimants Section 506(c) authority would open the flood gates to litigation.

Thus, while the Court's ruling appears facially narrow, *Hartford* will likely have significant impact in cases where, driven by equitable concerns, the bankruptcy courts have taken more expansive views of statutory construction.

VIDEOCONFERENCING FOR Fort MYERS HEARINGS

By Ed Rice

Courtroom 11B, Sam M. Gibbons Courthouse, was recently outfitted with a videoconferencing capability. Judge Paskay intends to conduct some of his Fort Myers case hearings via videoconferencing from his newly wired Tampa courtroom. In the future, notices for videoconferenced Fort Myers hearings will be marked as such, alerting attorneys of the option to either appear in Tampa (Courtroom 10B) or in Fort Myers. This should alleviate significantly the travel burden on Tampa bankruptcy attorneys who handle Fort Myers cases. However, not all Fort Myers case hearings will be conducted by videoconference. When Judge Paskay is in Fort Myers to conduct hearings, videoconferencing will not be available, and attorneys must appear in Fort Myers.

Additional Copies of the Bankruptcy Seminar For Paralegals and Legal Assistants Notebook can be purchased.

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LAWYERS ARE FROM VENUS: JUDGES ARE FROM MARS

Effective Advocacy in Bankruptcy Court

(with apologies to John Grey)

Margaret H. Mahoney
United States Bankruptcy Court
Southern District of Alabama

The following article is reprinted by permission of The Honorable Margaret H. Mahoney and American Bar Association and was published in Bankruptcy Litigation Newsletter, Winter 2000, Vol. 8, No. 1.

All motions and adversary proceedings are unique because of their adversary facts; however, most contested matters and adversaries share a similar procedural context. How can bankruptcy matters be handled most persuasively? It is always easier to critique than to do and the writer recognizes this fact while venturing to make suggestions. However, there are common themes heard when judges talk about cases – and the attorneys who try them.

TOP FIVE RULES FOR CASE PREPARATION AND TRIAL

1. Start You Preparation by Outlining Your Ideal Closing Argument

If you can outline the ideal closing argument for your motion or adversary case, you thoroughly know the law contradicting your position. If you know the law, you also know what facts will be central to your proof. This makes drafting of the pleadings, discovery and trial preparation more focused and sparing.

2. Always Prepare a Trial Notebook

A trial notebook should consist of the following sections:

A. All relevant pleadings

B. Direct or cross-examination questions or areas for questions for all witnesses cross-referenced to exhibits and pleadings and discovery

C. All possible exhibits

D. Cases and cites for evidentiary issues

E. Outline of opening argument and closing argument

F. List of possible trial objections

G. Relevant case law

It may seem to be overkill to some attorneys to have a trial notebook or folder for each proceeding, but it pays off. You forget nothing and are not as tempted to ask the question that results in the devastating answer. You know exactly where you are headed.

Some of the parts of a trial notebook need no explanation, e.g. points A, E and G above. Points B, C, D and F require some discussion and are more fully described below.

Part B. Every movant should make a list of the questions which need to be asked of each witness to prove his or her case. Each question should be cross-referenced to each exhibit to be offered and the foundational questions necessary for its admission. Cross-references to possible evidentiary objections should be included. If it is not known how a witness will answer a crucial question, the movant should have alternate follow-up questions, depending on the answer.

As each question on the list is asked (by the movant or any other party), the questions can be checked off and the answer noted. This makes closing argument easier. It also makes cross-examination easier because you have been able to note a witness' exact answer to a question on direct examination at the place in your outline where it is pertinent to your cross-examination.

The defendant should also have a list of questions necessary to refute some or all of the necessary proof points of a movant/plaintiff and to discredit the credibility of any adverse witnesses. The defendant needs to include foundational questions for exhibits, too.

Both plaintiff/movant and defendant need to anticipate objections to their own evidence and opposing evidence.

Part C. A trial notebook should contain every possible exhibit. How many times have you or your client left an important exhibit behind because you did not think it would be important? If you bring all possible exhibits, this cannot happen. Reviewing and bringing all possible exhibits with you also better prepares you for the hearing and witness examination.

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Part D. Case cites for evidentiary issues can make or break your case. If you cannot get a critical document in, you lose. This recently occurred in a case of mine. A creditor's attorney did not begin preparation for a dischargeability trial until the day before the trial. A crucial exhibit, the security agreement, was not in the branch office file as it was supposed to be. Creditor's counsel had another law firm fax to him a partial copy of the security agreement. At the hearing, creditor's counsel could not establish through his branch office witness that the copy was a valid one. The witness did not know where the copy had come from and had to admit that the copy, even if a valid one, was not complete. If creditor's counsel had started his preparation sooner, he could have gotten a complete copy (or the original) from the home office. Barring that, if he had had his witness do the work to obtain the copy, she could have testified to the validity of the copy as required under Fed. R. Evid. 1003, 1004 or 803(24).

Part F. A trial notebook should contain a page which lists all possible trial objections. This page can be transferred from trial notebook to trial notebook. It is an easy reference point when you are searching for the proper objection.

3. Always Give the Trial Judge and Her Clerk Copies of Your Exhibits

Fifty percent of lawyers do not have ready more than the original of their exhibits for use at trial. Another 25 % to 30% bring an original and one copy of all exhibits to trial. The witness uses one – the original – as he or she testifies, and opposing counsel gets the other copy. The people you are trying to convince of the "rightness" of your position, the judge and her law clerk, are left without the documents being offered and discussed. This is a big mistake.

4. In Oral Arguments, Make Each Point Only Once – Start and End With a Strong Point

Oral argument is the time in a case at which an attorney can convince a judge that his or her first inclination as to a case is right or wrong. Most judges have an idea about how a case or an issue should be decided as soon as they hear the facts. This inclination may be based on other similar cases, or on the law the judge has read to date.

Your argument needs to be persuasive. To be persuasive, it needs to be organized and succinct. Tell the judge the important facts and your legal points one time. Do not repeat. You will lose the judge's attention.

Start with a strong legal argument as you draw conclusions. Do not build from weakest to strongest; you may lose the judge's interest if you do. Leave out very weak arguments and let them stand in your brief. End with a strong point as well to leave the court with a favorable impression. When you have said everything once, sit down.

5. Be Flexible

If you are well prepared, this advice is usually unnecessary. You are able to "roll with the punches." An unexpected answer or exhibit will not exist, or you will be, able to cope with them.

If a judge appears to be concerned about one issue, focus more of your argument or hearing presentation on that issue. If a witness presents a different factual basis, find a way to turn it to your advantage. If necessary, ask the judge for a short recess to regroup. Learn to expect and deal with changes in midstream.

TURNOFFS FOR JUDGES

Six things that some attorneys do are very offensive to me and, I am sure, to every judge.

1. Lack of Candor

The biggest turnoff for judges is the failure of an attorney to be honest with the court. Such behavior is also illegal. 18 U.S.C. § 157. However, even where the behavior does not rise to the level of illegality, some attorneys just cannot be totally candid. For instance, they say "the brief is in the mail" when it is not; or they "contacted opposing counsel" and they did not. Once it has been clearly shown that an attorney has misstated a fact that he or she clearly should have known was wrong, that attorney will be mistrusted by the court for a very long time.

I am always disarmed by an attorney who, rather than disowning bad facts or fault, embraces them. If the attorney embraces fault on an issue, my own personal response to such humility is to give the attorney every benefit of the doubt and try to get him or her out of trouble. When an attorney says, "I did not get a copy of the order you signed to my clients as quickly as I should have, Judge, so please don't hold it against my client because it was my fault" or, "If Mr. Smith, the associate attorney in my firm, misstated something in that, pleading, it is my fault, Judge, because he is under my supervision and I am the attorney in charge," I am willing to bend over backwards to help. If the attorney has a case with bad facts, I am impressed when the attorney admits the clear ones im-

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mediately and instead focuses his case and argument on a few strong defenses. Not stipulating to the "bad facts" lets the court hear damaging testimony two or three times from witnesses instead of only once from the attorney in a written or oral stipulation.

2. Rudeness or Disrespect to Witnesses, Attorneys or the Court

The system of law in this country works for many reasons, including the fact there are penalties for violation of it; but on a daily basis, it works, in part, because of its procedural and historical basis. Part of that basis is the respect accorded litigants, jurors, witnesses, attorneys and judges, and the heightened courtesy required of those who participate in the court process. If any person in the process deviates from the standard of respect and courtesy, the system does not function as well. The search for truth and justice requires all participants be able to have their say without fear of ridicule or lack of respect.

Therefore, it is very important that all parties be held to a standard of behavior that treats all participants in the process courteously. This means that everyone is called by their full name – Mr. Smith or Ms. Jones – not Bill or Mary. It means all parties rise to address the judge and to speak. It means no party interrupts another party. No attorneys address each other except through the judge. It means everyone dresses in a clean manner as they would to attend church or another important function. If simple courtesies and respect are not required, the process will degenerate to a less truthful and less final resolution of disputes.

3. Wordiness – Legalese

I believe that many attorneys are overly tied to stilted, wordy pleadings instead of plain English pleadings. The reason may be that the public will decide they need fewer attorneys if they can understand the pleadings, and the pleadings use words they could write themselves. It will also be less costly. Less paper and lower mailing costs will be the result. In what other profession is it permissible to give the client a product that the client does not understand? Even doctors are having to explain operations, drugs and treatments in plain language these days.

Footnotes in briefs are also a form of wordiness or legalese. If it is not an important enough point to put in the text of a brief, the judge usually does not need to know it. A brief is not a law review article. Do not include lengthy string cites in briefs. Cite the best case or two on a point. Indicate that there are numerous other cases by stating, "*In re No Such Case*, 999 B.R. 999 (Bankr. D.N.E. 1999) (citing numerous other similar cases)." Judges will appreciate the pointed, focused help.

4. Tedious Examinations of Witnesses

If attorneys prepare their cases well, both direct and cross-examinations they conduct are to the point and much shorter than those conducted by less prepared counsel. Judges notice this fact. They listen harder because they know each question and answer will be a gem. When attorneys ask irrelevant questions or respond to every issue raised by opposing counsel, judges may lose interest.

5. Lack of Follow Through

It is always surprising to me how many attorneys fail to do required follow through after a hearing. When a judge requests that you present an order consistent with an oral ruling, get it in promptly. Do not make the judge's secretary, clerk or courtroom deputy have to call you-or worse yet, do not wait for the judge to issue a show cause order for promised documents. You need to have a system which brings unfinished matters to your attention.

Another follow through problem is failure to timely provide a brief to the court when one is requested. I have had numerous tardy briefs, and some attorneys never provided requested briefs or cases at all.

The final follow through issue relates to failure of counsel to fully explain the impact of a court's ruling to her clients. I am surprised how many clients write to the court or to the trustee to obtain an explanation of what happened at a hearing. I always wonder if perhaps counsel did not know what happened either!

If a judge sees a pattern of failure to finish matters, the judge might begin to assume that everything the attorney files lacks completeness. This is not a reputation an attorney would want to have.

6. Never Tell a Judge What To Do

If you want a judge to rule in your favor, tell the judge what you would like her to do and why, but do not tell her what she will do. A lawyer came into my court recently on a motion to reconsider a judgment/motion for new trial. Rather than phrasing his argument in terms of why a new trial might be appropriate, his first words were, "Judge, you will vacate the judgment in this case because the defendant's counsel and I have agreed that you will. We have settled all issues surrounding the order and we believe my new trial arguments are well taken." This is not a winning approach.

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PERSUASIVE OPENINGS

My philosophy on openings is "less is more." Let the trial tell the court most of the details. As we all know, in jury trials, opening statements are limited to a preview of the facts each side intends to prove during trial. In bankruptcy court, because extremely few matters involve juries, judges have often allowed attorneys more leeway in opening arguments. Attorneys turn openings into a full blown closing argument. This is certainly permissible; but I believe counsel should carefully ponder whether making an "opening closing argument" is really best.

The best opening arguments I have heard do three things:

1. Make the Judge Want to Hear the Case

Every trial or contested matter tells a story. Give the judge enough information to know what testimony to look for, but do not recite all the facts. Let the witnesses lay them out for the judge so you keep her interest.

2. Make Sure You Prove Every Fact You State You Will

To give the judge a road map and then run into road blocks you cannot surmount discredits your whole case. Even if the fact you could not prove was not the only one proving a particular point, the court may find that your proof is insufficient to sustain your burden without it. Once planted in the judge's mind, the lack of some fact may take on added importance.

3. Be Brief

Some of the best attorneys waive opening arguments in contested matters and adversary cases. The witnesses are the best way to lay out your facts – especially if the case will be brief, has limited issues, or you have articulate witnesses.

HOW TO PREPARE YOUR WITNESSES

Prepare your witnesses for the worse; then whatever happens is as expected or better.

1. Let your witnesses tell a story. The best way to present your case is to let the witnesses lay out the facts in chronological order if possible. Teach them how to tell their stories in short "bursts" of one or two sentences as direct and cross-examination will require.
2. Go over areas of cross-examination and practice difficult cross-examination areas. It is worth the risk of your opponent asking how much preparation you have done with the witness. Questions that attempt to discredit preparation time with witnesses usually do not impress the judge. A flustered, nervous witness is a disaster. The witness appears to be less credible, even if he or she is not.
3. Teach your witnesses to answer cross-examination questions carefully. "Could you repeat that question, please?" or "I can't answer that questions with a yes or no" are acceptable answers, but some witnesses have not been told that.
4. Teach your witnesses to act attentive and cordial at trial to opposing counsel and to you; they should never act condescending or angry. An attitude, or what appears to be an attitude, is important to a judge's perception of a witness' statements.
5. Ask the tough questions yourself. If the most difficult subjects are broached by you, the worst sting is taken out of the question and answer. The witness can also be asked the follow up questions necessary to put the difficult fact in its best light.

CONCLUSION

Attorneys' best weapons are truth and hard work. From these two virtues flow most other important advocacy techniques. To judges, preparation – not theatrics – matters. Your reputation is built or destroyed one case at a time.

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Dinner served at seven-thirty.

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